IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.258 OF 2006

1. Mangaldas K. Naik

2. Shri Shrikrishna K. Naik

3. Shri Shripad K. Naik

4. Shri Keshav S. Naik (deceased)
s/o Saji Naik
All major in age,
r/o H.No.612,
Near Goa Shipyard Ltd.,
Vaddem, Vasco-da-Gama, Goa
since deceased represented by legal heirs.

4(a) Leela Naik
w/o late Keshav S. Naik.

(b) Mohan alias Saji Naik,
s/o late Keshav S. Naik

(c) Manik M. Naik
w/o Mohan Naik.

(d) Chandrahas K. Naik
s/o late Keshav Naik

(e) Rekha C. Naik
w/o Chandrashas Naik

(f) Dilip K. Naik
w/o Chandrashas Naik

(g) Praful D. Naik
w/o Dilip Naik

(h) Ganpat K. Naik
s/o late Keshav Naik

(i)Geeta K. Naik
w/o Shripad Naik

(j) Sudhir K. Naik
s/o late Keshav Naik

(k) Vinod K. Naik
s/o late Keshav Naik
All major in age,
R/o H.No.612,
Near Goa Shipyard,
Vasco-da-Gama, Goa.

(l) Meera M. Naik
w/o Mangaldas naik

(m) Roshan Mangesh Naik

(n) Mangesh Naik
both major in age,
r/o Borda, Margao, Goa.

(o) Joshna S. Naik

(p) Soiru Naik
both major in age,
r/o Navelim, Bardez, Goa. .... Appellants.

Versus

1. Inspector of survey and land records
City survey, Cosomb, Building
Vasco-da-Gama.

2. State of Goa,
though Chief Secretary,
Secretariate, Panaji, Goa.

3. Shri Suryakant P. Palyekar,
H.No.610, Near Goa Shipyard Ltd.,
Vasco-da-Gama, Goa.

4. Confre de Confraia de Santissimo
Sacremento e de Nossa Senhora de Guia,
Through his attorney,
Confraria Office, Gula Building,
Vasco-da-Gama, Goa.

5. Confraria de Bom Jesus e das Santas
Almas de Igreja de Vasco-da-Gama,
Through its attorney,
St. Andrew's Church,
Vasco-da-Gama, Goa.

6. Secsao das Confrarias
Archdiocese of Goa

Through its in-charge,
Fr. Santan Faleiro,
Altinho, Panaji, Goa. .... Respondents.

Mr. C.A. Coutinho, Advocate with Mr.S.K. Naik, Advocate for the appellants.

Mr. Ulhas G. Shetye, Advocate for the respondent no.3.

Mr. Marcelino C. Fernandes, Advocate for the respondent no.5.

Coram:- J.N. PATEL, J.

Date:- 6th December, 2006.

ORAL JUDGMENT:

Admit.

2. Heard the learned Counsel for the parties.

3. At the time of considering the appeal for admission, this Court by its order dated 15.11.2006 made it clear that the respondents are put on notice that the First Appeal is to be disposed of at the stage of admission itself, on a preliminary issue raised in the appeal and accordingly this Court has heard the learned Counsel for the parties without calling for the records and proceedings as the same is not required for the purpose of disposing of the appeal in question.

4. The appellants are the original plaintiffs who filed the suit for declaration and injunction against the defendants no.4 and 5 and sought a

decree seeking a declaration that the plaintiffs are in possession of the suit property to the extend of 373 square metres which is shown in the plan annexed to the plaint and further that the rational price of the suit property will not be more than Rs.500/- per square metre. The plaintiffs also sought that the Sale Deed dated 15.2.1999 bearing registration no.108 at pages 85 to 97, Book no.I, Vol.257 in the office of the Sub Registrar Mormugao between defendants no.3 and 4/or 5 as sham and non speaking, and also sought perpetual injunction not to interfere into the suit property and carry out any measurement and demarcation therein and particularly defendant no.3 in disturbing in any way the possession of the suit property by the plaintiffs.

5. On being served, the defendants entered appearance and not only challenged the claim of the plaintiffs, but defendant no.5 also made a counter claim claiming that the plaintiffs have no right of any kind to any part of the suit property and that they have illegally constructed house in the suit property in violation of the proprietory rights of defendant no.5 sometime in October 1999 and sought relief that the plaintiffs be directed to deliver vacant possession of the said balance area of the suit property under Chalta no.27, P.T. Sheet no.68, Vasco to the defendant no.5 with prior order of demolition and removal of the house/structure constructed therein.

6. To this counter claim, the plaintiffs have filed their written statement and took upon a plea that they are in use and occupation of the suit property and have been in peaceful enjoyment of the same for last more than 50 years without any interference. It was subsequently pleaded that the

possession was given by defendant no.4 and that plaintiff no.4 since the year 1979 is making representation to the defendant no.4 and defendant no.6 to purchase the same and that being a God fearing person did not seek to grab the property, but claimed right in the suit property for being in lawful possession for last more than 60 years.

7. On the basis of the pleadings, the Trial Court was pleased to frame the following issues :-

> 1. Whether plaintiffs prove that plaintiffs are entitled to purchase suit property?
>
> 2. Whether plaintiffs prove that sale deed between defendants 3, 4 and 5 is sham?

8. Thereafter, the parties led evidence and the impugned judgment and decree came to be passed dismissing the suit of the plaintiffs and decreeing the counter claim of the defendant no.5 by directing the plaintiffs to demolish and remove the illegal construction/house constructed by them in the suit property bearing chalta no.27, P.T. Sheet no.68, Vasco and deliver the vacant possession of an area of 341 square metres on the eastern side of the said property to defendant no.5.

9. At the time of delivering the judgment, the Trial Court found that though the defendants have filed a counter claim which is contested by the plaintiffs and evidence on the same has been led by the parties, it was necessary for deciding the suit to incorporate issue no.3 as it found that this

issue remained to be framed and was necessary for disposal of the counter claim made by the defendants and therefore the following issue came to be framed as issue no.3.

> "Whether defendant no.5 is entitled to have vacant possession of the balance area of the property, and whether plaintiffs are liable to demolish and remove the house/structure constructed therein?"

10. The learned Counsel appearing for the original plaintiffs submits that the plaintiffs have been deprived of an opportunity to meet the issue which came to be framed by the Trial Court at the time of delivering the judgment in the matter. It is contended that the Trial Court having failed to frame issue no.3, it has deprived the plaintiffs of an opportunity to lead evidence and therefore on this very ground the impugned judgment and decree deserves to be quashed and set aside and the matter be remanded for de novo trial.

11. It is contended that if this issue was framed before the parties were called upon to lead evidence in the matter, the plaintiffs could have placed on record evidence which would have disproved the claim of the defendants. It is further contended that on conclusion of the evidence, if the Court realised that such issue does arise between the parties for the decision of the case, thereafter it ought to have framed the issue and the parties should have been given opportunity to lead further evidence in the matter. Therefore as the plaintiffs have been deprived of the opportunity to lead evidence, the Trial Court fell in error in deciding the case in favour of the plaintiffs on the basis of issue no.3 thereby depriving the appellants/plaintiffs of the opportunity to meet the

case of the defendants made in counter claim.

12. On the other hand, it is contended by the learned Counsel for the respondents/defendants that the plaintiffs otherwise could not prove their own case either by oral or documentary evidence and as a consequence of which the counter claim of the defendants was rightly decreed by the Trial Court and the plaintiffs could not bring on record any evidence to show that they have any right in the property to entitle them for such a declaration and injunction as sought in this suit.

13. It is further contended, that the parties were well aware of the lis pending before the Court and the defendants having made a counter claim which was duly replied by the plaintiffs by filing written statement and parties contested the same and had full knowledge that the defendants is claiming possession of the suit property by ejectment of the plaintiffs. The parties have led their evidence relating to counter claim of the defendants and therefore merely for this technical error of the issue being not framed, the judgment and decree of the Trial Court does not call for any interference.

14. The only point which arise for determination in this appeal is whether the plaintiffs are entitled to be given opportunity to lead evidence on issue no.3 which has been framed by the Trial Court while dismissing the suit at the stage of delivering judgment and the answer is in the negative for the following reasons:-

Firstly, there is no quarrel over the issue that the parties were aware of their respective claims and counter claim and none of the parties applied to the Court for framing the additional issue which was subsequently casted by the Court on the basis of pleadings of the parties and the relief sought in the counter claim by the defendants and thereby the parties conceded their rights of raising the issue though they were well aware that the Court is expected to dispose of the counter claim of the defendants in which the defendants have prayed for ejectment and possession of the suit property.

Secondly, if one examines the evidence of the plaintiffs, the plaintiffs have not been able to make out any case to show that they have any legal right to claim and continue in possession of the suit property. The learned Counsel for the appellants/original plaintiffs made a feeble attempt before this Court that from the pleadings it can be very well demonstrated that the plaintiffs could claim right to the property by way of adverse possession, but unfortunately the plaintiffs' own evidence is against this. On the other hand, the Trial Court has taken note of the fact that the plaintiff in his cross examination has admitted that he is on the suit property by virtue of licence from the defendants no.4 and 5 and it is with the permission of the defendants no.4 and 5 that he was allowed to raise a structure and reside in it. There is no evidence led by the plaintiffs to show that the plaintiffs were in possession, hostile to the title of defendants no.4 and 5 since more than 12 years to make out a case for adverse possession.

15. Therefore, in the facts and circumstances of the case, merely

because the Trial Court at the time of delivering the judgment, found it necessary to frame issue no.3 does not enable the plaintiffs to claim that they are being deprived of an opportunity to lead evidence to meet the issue which has been casted arriving out of counter claim filed by defendant no.5 which has been duly met by the plaintiffs by filing written statement and tendering evidence during trial of the suit.

16. The learned Counsel appearing for the respondents pointed out to this Court the authority on the point by referring to the case of ***Nedunuri Kameswqramma, v. Sampati Subha Rao, reported in AIR 1963 Supreme Court 884,*** wherein in paragraph 6 of the reported judgment, it has been held that -

> "since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

This in the opinion of this Court, squarely apply to the case of the appellants/plaintiffs and has been a settled proposition and consistently followed by the Courts when such a point is raised after the parties went on Trial fully knowing their respective case and has led required evidence, on an

issue which was not framed but subsequently weighed with the Court and came to be decided on merits.

17. It is not the case of the appellants/original plaintiffs that no opportunity was given to them to lead evidence in counter to the claim of the defendants to seek eviction of the plaintiffs and the evidence on record clearly shows that the plaintiff did lead evidence to that effect, and on the other hand went on to admit that they have no documents to place on record in support of their contention that they are in possession of the suit premises adversely to the defendants and had carried out any construction thereon which can be construed as hostile to title of the defendants.

18. Therefore, this Court finds that there is no merits in the appeal and the same is dismissed with costs. Order accordingly.

J.N. PATEL, J.

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